S02E03 - Johnson v M'intosh and Federal Anti-Indian Law with Peter d'Errico Transcript

Jordan Brady Loewen-Colón (00:00:01):

Hello and welcome to The Mapping the Doctrine of Discovery Podcast. The producers of this podcast would like to acknowledge with respect the Onondaga Nation, Firekeepers of the Haudenosaunee, the Indigenous peoples on whose Ancestral Lands Syracuse University now stands. And now introducing your host, Phillip Arnold and Sandra Bigtree.

Philip P. Arnold (00:00:31):

Hello everyone, this is Phil Arnold and welcome back to Mapping the Doctrine of Discovery. I'm faculty in the religion department at Syracuse University and core faculty in Native American Studies, the founding director of the Skä•noñh Great Law of Peace Center and board member of Indigenous Values Initiative.

Sandra Bigtree (00:00:52):

And I'm Sandy Bigtree and I'm a board member of the Indigenous Values Initiative. I always like to add that Phil being involved in the religion department at SU can sometimes go just past someone, but it's a very unique department in that it was very much involved with the critical analysis of religion back in the 1960s with their God is dead theology. So it's not like they're training ministers, it's always had this hard edge. So I always have to make that clear.

Philip P. Arnold (00:01:27):

And we are super excited to be interviewing today Peter d'Errico. Peter is Professor Emeritus of Legal Studies at the University of Massachusetts at Amherst where he has taught for more than 30 years. He is a member of the New Mexico Bar and was staff attorney at the Diné Legal Services. He has litigated Indigenous land and fishing rights as well as native spiritual freedom rights in prisons. And he consulted of counsel in other native cases. He is a regular presenter of online seminars about Indigenous peoples legal issues at redthought.org and elsewhere, including National Endowment for the Humanities, summer Institutes for Teachers on teaching Native American histories. And Peter today is here to talk about his brand new book called Federal Anti-Indian Law, the Legal Entrapment of Indigenous Peoples and Sandy are super excited about this book. There's so much to talk about here, but we'd like to get into this because we're not legal scholars.

(00:02:46):

We want to get into it as normal people interested in issues of the doctrine of discovery, the oppression of Indigenous peoples. So Peter, initially what really interested me as a non-native writer on these issues in the preface, you really go into why this matters, why it matters to you and why it matters in the world just generally. And I think that's a really important orienting piece of the book because so much of what we do has to do with allyship between Indigenous and non-Indigenous or settler colonial people. So I think that your introduction to the book is logically where we should start and you can tell us about yourself and how you got into this work.

Peter d'Errico (00:03:47):

All right, thank you Phil and Sandy. It's great to be with you and to see your faces and hear your voices. I really appreciate that we have a chance to talk about the book and I also have to say I'm super happy it's out. It's been a work a long time coming. So you asked about the beginning and where I come from and how I get involved and what it all means to me. And you're right, the book opens with a discussion of that and I was prompted to do that by JoDe Goudy. He's a former chair of the Yakima Nation Tribal

Council and the owner and organizer of Redthought.org. And we've had fair amount of work together. And as over the months and years that we've talked and when the book finally came out, he said, "You need to tell people why is this important to you personally?"

(00:04:43):

And it struck me, yes, that's right. And it made me dig into my own personal history in a way that I have actually found I'm provoked to do when I'm dealing with native people and particularly when I'm dealing with Indigenous medicine people that they... It's I guess the closest parallel might be something in terms of how any spiritual practice turns you to look at yourself. Who am I? Where did I come from? Where am I going? So I took that seriously from JoDe and I began to work on it. And I don't need to go into all that detail that you're going to get when you read the book. But to suffice to say that what is very clear from my internal perspective is I got involved in this work now more than 50 years ago because it meant something in my life. To me it was, I may have started as a lawyer going out to Navajo land altruistically thinking, "Oh, I'm going to do some good for some people."

(00:05:45):

But very quickly I realized they have a civilization that's a non-Western world civilization and they don't really need help. In fact, what they need is to get the US civilization off their backs. So what was going to happen with my role of being the good guy and wanting to help and it rapidly disappeared. Not that I wasn't tendering cases and doing what I could to help people, but I realized my real motivation was it's what's in this for me, my life, understanding reality, understanding the world, understanding the cosmos and that has driven me through these ensuing years in the teaching and in the litigation is that I don't make any claim to be altruistic. I'm your ally, I'm here to help.

(00:06:37):

It's more I'm standing side by side and we're both investigating the same thing, which is life. Philip Deere, Muskogee Creek medicine teacher was one of the people that helped me understand this. We were talking together one day and somebody said, "What is the Indian way of life?" And Philip said, "I'm not talking about an Indian way of life, I'm talking about a human being way of life." So yes, I'd say the way I got into this is I'm a human being and if I'm allied, I'm allied with human beings, but also with all of creation. That's what I've learned. That's where I am. That's what I work from. So that's a long answer, Phil, but if it suffices, we can let that go.

Sandra Bigtree (00:07:29):

Well, I think I would like to give a little background in to what led me into this work as well. I grew up in Central New York as a performer, a child performer. So I was isolated from other realities most people experience being native and nonnative. And it was in 1978 that the Onondaga, Oren Lyons' brother, Lee Lyons specifically invited me to bring the band that I had at that time on the territory. And they wanted me to help open the doors to non-native people, specifically to learn about the Haudenosaunee influences to American democracy, the women's rights movement, regenerative agriculture and lacrosse. And so I had an awful lot to learn and felt that I needed to leave Syracuse to learn more about all of this. So within a few years I found myself in Boulder, Colorado. This is where I met Phil, and I was working for the Native American Rights Fund.

(00:08:30):

And I really had assumed because I grew up in the city that tribal governments protected the Indigenous traditional people in their territories. But when I went to Boulder, I was editing a class with Charles Wilkinson on federal Indian law, and I was getting enraged, knowing the little bit that I knew about the Onondaga Nation with being taught that there's three forms of government. There's federal law and

there's state law and then there's federal Indian law, and then they so much as [inaudible 00:09:09] say Federal Indian laws under the guardianship of the United States. And I'm like, "Oh, wait a minute." And I couldn't stay the whole semester to learn about this because it was so disorienting and upsetting.

(00:09:24):

And so we left soon after that, came back up to Syracuse. But I know in your book you're talking a lot. Well, it's federal anti-Indian law. And that's exactly the way I perceived it because when I worked at NARF, they made it very clear they never take an Indian against Indian case into litigation. And I just had a lot of questions. I mean, I loved the people I worked with, but I couldn't work there because every case they took was an Indian against Indian case because they were stifling of the traditional people on each of their territories because those governments were designed to do such. So you go through all of this in your book and it's just so thrilling. Someone's finally, an attorney has broken this down so people can read it. So I'd just like to have you continue on in this conversation.

Peter d'Errico (00:10:19):

Well, thank you, Sandy, for your own personal story there. I think that we each come at this for serious personal reasons, and I think if people don't, then it's too bad. Let me just leave it in a mild way. But it also... Actually, I'll say more, it can be misleading. And it strikes me when I hear these so-called acknowledgement statements now that are the latest thing, most of them so completely shallow. So a person comes in and says, "Oh, where we're standing, this building used to be... The land belonged to somebody else. And we remember that and we're very grateful that we can be here. Now let's get on with the program here." And often it seems to me it actually goes. It does damage because somebody thinks something actually happened that was useful and meaningful. So it's very rare that people step back enough that's out of the notion like, "Oh, I'm doing good by saying some words here," and ask themselves what is it all about?

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And when you spoke about how can there... Every case is Indian against Indian so-called. And the only way that you can understand that which you have, you said was that the so-called Indian governments are creations of the US very clearly. And that's part of what was called the Indian Reorganization Act in 1934, which is again, it's lauded as, oh, what a Pro Indian Act. They stopped the allotment process. Well yes, that was wonderful, stopped the allotment process, but in addition, they got rid of, and not that they unilaterally got rid of it, but there's a lot of pressure and arm twisting for Native nations to get rid of their traditional governments and to create something that was modeled on a business corporation board of directors that was then called a tribal council. And the history of the Navajo in particular reveals this because the council was created even before that process.

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And it was created specifically so that the Navajo could sign leases with mining companies and oil companies. And it was not permitted to meet unless a representative of the Secretary of Interior was present. So we're talking about, it's a pretty blatant and open history though it's mostly brushed under the rug by the rhetoric of, "Oh, the Indians." And they have such a moral claim on us. But really when you get down to it it's much more complicated and detailed than is usually alluded to. And when you start pulling the pieces apart, it's very threatening because the whole structure starts to come apart. It's like having a loose end on a sweater and you start to unravel it. And pretty soon if you don't quit, you're not going to have a sweater left, you're going to have a pile of tangled yarn. Most people don't want to go down that road. It's too frightening.

Sandra Bigtree (00:13:31):

Yeah, we've experienced that. You're the first to start articulating all of it from a legal voice.

Philip P. Arnold (00:13:39):

Yeah. Maybe we can jump into this a little bit more. We're primarily interested in the Marshall decisions. And if you could just simply map that for our listening audience, the three primary decisions that you're talking about in the book and how they define what you call anti-Indian law. Well, maybe we should step back and say, what is it about these decisions that form an anti-Indian law tradition in the United States, right? Initially and then we can move on. Yeah.

Peter d'Errico (00:14:18):

That's a good question. That's a good way of putting the question. The Marshall Trilogy is if you know anything about this history is the beginning point. And so of course it's very important to look at. Secondly, it's important to reexamine it because there are so many misconceptions built into the rhetoric about how these are usually talked about. And to the glorification of John Marshall himself, that gets in the way of really understanding the anti-Indian aspect. So the very first one, Johnson against Macintosh, if I use that phrase, federal Indian laws, because that's the way the US characterizes it, that started them, but it didn't... There wasn't anything except a property case. Johnson against McIntosh is a property case. And the question in the case was of these two competing non-Indian parties, which one of them could claim ownership of land that was in Piankeshaw country and what the area that people now call Illinois and Indiana. And the Johnson side said, "Well, we've bought it from them. We have deeds right here. We paid them good money and they agreed that we can have this property."

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And the other side, the Macintosh side said, "We got it from the United States, we got a deed from the United States." And so this goes up to the Supreme Court and the Supreme Court, the short description of the case is the Supreme Court says, "Well, McIntosh is going to win this case because the Piankeshaw didn't have anything to sell to the Johnson side because they don't own anything. They don't own the land. So how could they have sold the land when they don't own the land?" Well, who owns the land? The court said that land is owned by the United States. Well, how did the United States own that land? The United States owned the land because it was the the heir, I guess you could say to the British crown. And how did the British crown own it?

(00:16:28):

And Marshall goes through all of these steps. The British crown owns the land because they had the royal prerogative and the papal blessing as Christians to take any land that was discovered, quote unquote, unless another Christian had gotten there first. And this was the rule that they applied that the rule of Christian discovery. And he uses the word Christian, I don't know, at least 13 times in the opinion. But most of the time people talk about it they don't talk about the fact that that's what it's all about. They talk about it as if, first of all, it's a European rule, not a Christian rule. And then they talk about it that it really wasn't such a bad decision because in the end he said that the native peoples had a right of occupancy, which he called native title.

(00:17:21):

And so people say, "Oh, well, so they do have title." But when you studied the case as a lawyer and you have the common law in the background and you have property law principles in the foreground, then you say, "No, an occupancy that can be taken, that does not include actual ownership of the land is not title." So *Johnson v. M'Intosh* sets the premise that native peoples do not and cannot have title to the

land once a Christian discoverer has come onto the scene. That's the first case. So it sets up, there's a property rule that determines which of these competing non-native groups of speculators is going to get this Piankeshaw land.

(00:18:04):

But on having made that decision in the matter of property law then becomes the next case, Cherokee Nation. About 10 years later, Cherokee Nation is suing the state of Georgia because Cherokee Nation has a treaty with the United States, and the treaty says that the Cherokee Nation recognizes the US and the US recognizes the Cherokee nation and they have a nation to nation relationship, and that each one will come to the defense of the other, et cetera. Georgia, meanwhile says, this is not Cherokee land. Georgia is using the same argument that Marshall gave to the US. Georgia is saying, "We have a royal grant, our grant, we had that grant even before the US existed. So this is really Georgia land and we're going to take it over." And they send in troops to actually start forcing the Cherokee out.

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And they say that this is what we're going to do now. So the Cherokee Nation says, "Wait, we have the treaties of the US." They filed a case in the United States Supreme Court saying, "You have to hold your terms of the treaty. You're supposed to defend us against Georgia." To cut to the chase here. Marshall says, "Well, you're not really a separate nation because we claim title to your land." So now he's invoking what he decided in Johnson, since you don't really own your land, you're not really a nation in the international law sense, and so you don't have a right to even come into the Supreme Court to ask us to do this.

(00:19:39):

You don't have any standing here, is the short answer. Now it's been what I show in the book is that how deceptive and really malicious his rhetoric, his analysis was because the Constitution says that the treaties are the supreme law of the land. And justice Breyer pointed this out in a lecture some years ago who said, strangely enough, Marshall didn't even deal with that argument which the Cherokee were making. So here's again this, it's Mendacious. It's a form of lying. So Marshall creates this thing out of whole cloth about Christian discovery in step one. Step two, the second case, he just declares that because they don't own their land, that they don't have any standing here. And he doesn't even deal with the argument about the treaty clause. He just ignores it completely. So I'm always curious when people say what a great judge he was and what a thoughtful writer he was.

(00:20:37):

That's just baloney basically. Okay, quickly, the third case, and this is the one that confuses people the most, *Worcester v. Georgia*. So one year after the Cherokee Nation are thrown out of the Supreme Court, a case comes up from a lower court in Georgia from a group of missionaries that have been sent down from Vermont to Missionize among the Indians, and they are operating under a federal program to so-called civilize the Cherokee. And Georgia is not happy with that anymore than they were happy with the Cherokee themselves being there. And so they arrest the missionaries. They say, "You people don't have a permit from the state of Georgia to go on that land. And the penalty is four years at hard labor." And the missionary say, "Oh, we're here with the permission of the US and the permission of the Cherokee." And Georgia says, "The Cherokee don't count. We've already said that they don't own the land and the US, who cares what the US says."

(00:21:32):

You remember, this is beginnings of secession movement. They say, "The US doesn't have any claim here. We've got claim." And so they lock them up. Well, the case quickly gets up to the Supreme Court

and Marshall says, "Now this case we can take because there's a US citizen involved here, the missionary, in other words, and so we're not going to throw this case out of court." And so he says, "Now we're going to talk about the treaty. Well, the treaty says that Georgia can't go in to these lands." Now remember, he refused to uphold the treaty in the Cherokee nation directly, but to protect the missionaries now and the federal program of civilizing the Cherokee so-called, he says that the Georgia doesn't have any right to go in here.

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Now, most people stop reading the case there because it's some amazing rhetoric that Marshall puts out that the Cherokee nation is a nation under itself and nobody can enter. Georgia has no right to go in. And then you get to what I call the fine print. He says, "Nobody can go into the Cherokee country except with their permission or if Congress gives him permission. You say, "Oh, well wait a minute, wait a minute. I thought, how did Congress get permission here?" Now we realize what we're still talking about, that the Cherokee don't have title and when... To close the case out he says that it's really wonderful that this civilization program is happening and that the missionaries are there doing this work. And that the overall relationship between the Native nations is... The rather, I don't mean the overall relationship, the overall structure of relationship to Native Nations is that the US has complete power in the issue of their land and their people and what can happen with them.

(00:23:18):

So in the end, *Worcester* gave nothing. It was, there's some rhetoric that people are totally confused about. And you find that the rhetoric combines with other rhetoric. I didn't mention in Cherokee Nation, but put this back to loop back in, Marshall says when he said that the Cherokee nation are not a real nation, he called them a domestic dependent nation. And he said that the relationship between the US and the Cherokee nation is not really nation to nation. It's more like a guardian to a ward that they are supervising the Cherokee. And that's the beginning of the... So what's now called the trust doctrine that the US says we're acting as the trustee for these native people. And so you, to have that deceptive language in Worcester combined with that notion that he just makes up, again, out of whole cloth guardian ward. So you see that the Marshall Trilogy is of a complete structure of federal domination over Indigenous nations claiming ownership of their land, claiming sovereignty, claiming the power to determine what happens.

(00:24:35):

Well, the church was hand in glove, just like the reservations under US grant, under president Grant. The churches were heavily involved in reservations in the so-called civilizing process and the boarding school so-called, which were really like penitentiaries. They were all integrated with church work. It was, yes. And if you read any of the records of the meetings of the so-called Friends of the Indians or the Lake Mohawk conferences that were held, the religious people and the government people and people like Pratt, Henry Pratt that started the Carlisle School, they're all in the same ball. They're all in the same game. They're all using the same rhetoric that've got to get, as Pratt said, the infamous comment, kill the Indian and save the man. And Christianizing was the best way to make sure that these little kids that were taken to the boarding schools were going to forget who they are, lose their own understanding of life and become little American kids.

(00:25:41):

And if I could say one more thing about this, which is this is where things get controversial, because it's... What this analysis does is to expose the falseness of the idea that it's a wonderful thing that native people are voting and running for office and so on. That's actually the fulfillment of Henry Pratt's dream. That's the fulfillment of the civilization program. It's not a resurgence of Indigenous people's

independence. It's the taking of individual Indigenous people and saying, "Oh, you are just all other Americans." And then the next thing, we'll get to this at the end if we talk about ICWA, but the next thing that happens there is then, "Oh, it's really..." It's like this phrase, BIPOC, Black Indigenous people of color.

(00:26:35):

Well, the Indigenous issues are totally different from what are thought of as civil rights issues for Black people and people of color. We'll talk about that later with ICWA. But it's such a tangled web. And to begin to unpack it, you have to start at the beginning. You have to say what is the foundation of this, *Johnson v. M'Intosh*, *Cherokee Nation v. Georgia* and *Worcester v .Georgia*, what did they really set in motion?

Sandra Bigtree (00:27:01):

Well, it sounds like Marshall just made it all up, and he went completely against the Non-Intercourse Act of 1790, which established the nation to nation treaties, which the Haudenosaunee, through Onondaga being the central fire, they adhered to that nation to nation treaty, those original treaties. It's the law of the land. So Johnson just, or Marshall just made it all up and weakened those acts. Right? And it's funny that in 1923, there was a delegation of Indigenous leaders and from Onondaga Nation that went to Geneva to complain to the world courts that the treaties were not being acknowledged and they were... Because nobody was listening to them in the United States. And when they came back, it was the very next year, 1924, that the US bestowed citizenship on native people all over this country. So it was like, you take an action and the US would replace it with an act or a new law. So that's been happening since contract.

Philip P. Arnold (00:28:18):

A lot of what you were just saying resonates with us in Onondaga nation territory. And they, as you know, Peter and I just reiterate it for our audience, Onondaga is only one of maybe three or four and possibly native federally recognized Native nations that do not have a BIA government. Do not have those kinds of governments installed, which enables them to be at the forefront of international work. Other kinds of work they can do things that other Native Nations cannot because the federal government has no involvement at this nation. Of course, they're among the most impoverished in the nation and across the United States as well. So that's a story that we're also trying to tell on this podcast. But I think because we are here in Onondaga Nation territory, this, your kind of work really resonates very, very well with what the Onondaga nation has had to endure over several centuries now.

Sandra Bigtree (00:29:34):

I like where you talk a lot about the use of the word tribe, because in the original treaties, the Indigenous leadership among the Haudenosaunee specifically, that's what I know most about, they signed these treaties as an equal part as nation to nation. And the founding fathers would often refer in the books that they were brothers, and they were set straight by [inaudible 00:30:01] of the Haudenosaunee that would say, "No, we're not..." No, I'm sorry. The federal government would always refer to father and son relationship with the Haudenosaunee and other Indigenous nations. And they were corrected by the Haudenosaunee said, "No, it is not this hierarchical. We are on a level basis, we are brothers more like a brother to brother nation-"

Philip P. Arnold (00:30:27):

Nation to nation.

Sandra Bigtree (00:30:28):

... "relationship."

Philip P. Arnold (00:30:29):

I mean, I would like to hear you comment on what Sandy was saying about this 1790 Non-Intercourse Act, because I think on the one hand, Marshall was trying to substantiate federal power in those three, and that's what the Non-Intercourse Act was about. You know, can't have states making their own deals with native people or native entities at that point, native Nations without federal government involvement. But then on the other hand, he's undermining that nation to nation relationship that's established in the Constitution and the Non-Intercourse Act.

Peter d'Errico (00:31:14):

Absolutely, absolutely. Well, you said it very succinctly and accurately is that the whole tenor of Marshall's work, and not just in these cases by the way, and basically his whole career on the court was the enhancement of federal power against everybody against the world, certainly against the native peoples and also certainly against the states. He was interested in that kind of an imperial view. And what I use, the imagery I use is that in Marshall's view, and I think this is actually what you could say actually happened, the so-called American Revolution, it cut off the head office of the king and took the crown. It didn't really change any structural elements that matter. It was a question of saying, "Where is the highest power?" And Marshall was making clear there is a highest power and there's not going to be a situation where we have a bunch of different powers like the individual states and a bunch of different powers like the Native Nations.

(00:32:16):

And imagine if you can what that... Well, just go back to *Johnson v. M'Intosh*. Marshall says that if these people on the Johnson side that made the deal with the... And paid money and had a contract, if they had property there, it would be property under Piankeshaw law. And then he just drops that and goes ahead and says, "Well, and we couldn't enforce that. That would be up to them to enforce." And I'm thinking, well then, so there's a model in the background that doesn't get touched, which is what's the original free existence? My friend Steven Newcomb, who all you know, uses that phrase a lot, the original free existence of Native Nations. And the original free existence of the Piankeshaw was, yes, we can make a deal with these outsiders. We can give them some property, then we can make a contract with them, it'll be under our authority.

(00:33:09):

And what's the problem with that? Nobody seemed to have a problem except Marshall who says, "No, we're not going to permit that thing to happen." And why not? Well, because they might be misled. We need to protect them. But it has been shown... Some detail work in New Zealand has been done actually putting numbers to this. It's been shown that the result of this notion that only the federal government can deal with native lands was there was just as much ripoff as in any situation where there was no government involved. Where it was just individual speculators trying to come in and buy lands. On one hand, protection is the emperor's new clothes to cover over domination. And on the other side, it was just a complete empty promise. There was nothing being... It's like who protects you from the protection gang? That's what a protection racket is all about.

Jordan Brady Loewen-Colón (00:34:08):

Do you need help catching up on today's topic or do you want to learn more about the resources mentioned? If so, please check our website at podcast.doctrineofdiscovery.org for more information. Now, back to the conversation.

Philip P. Arnold (00:34:25):

I know this isn't part of your book, but this is a side note that you might be interested in. And this is all based on the Vatican's pronouncements in the 15th century. So that's the center of our interests in trying to map this thing. So because we're in religion, we're trying to appeal to wide religion audience, academics and activists and all those people. However, it seems like we're talking to a lot of lawyers. I mean, we've had Steve, we've had Lindsey Robertson, we've had Bob Miller, and we have you now. So a lot of lawyers seem to be really clarifying these religious issues essentially for me and for others.

(00:35:12):

And I ask this of a lot of different people, but you have essentially the United States, which is a completely a Protestant project. A protestant nation building project based in the 16th century that is completely reliant on Catholic pre-protestant declarations of who actually has control of the land of people's bodies, of all the stuff in the world. So there's Marshall among others, up until 1960 when we elected the first Catholic president, we were deeply suspicious of anything Catholic, deeply suspicious. And as you point out in your own family, Catholics and Italian Catholics in particular really persecuted in this country.

(00:36:14):

And now currently we have a Catholic president, again, not even really a conversation anymore in the main press. But what do you make of this? I mean, you have these religious dimensions, you have religious wars being played out over hundreds of years between Protestants and Catholics, heretics being burned at the stake, these kinds of inquisitions going on. And yet legally speaking, there seems to be this real, what? Comradery between Christians of all types, because Christianity after all is a very complex and multidimensional thing in the world. But here we seem to have unanimity of opinion.

Peter d'Errico (00:37:08):

Yeah. Well, I want to just insert a little personal note. One of the things that I'm grateful for is having been... My father was born in Italy, so I guess in blood terms, half Italian, whatever that means. But I grew up, my earliest life with my grandparents, his parents, my aunts and uncles. And my grandfather, though he was... Obviously he was Italian, was vehemently anti-Catholic for whatever reasons he had. So I don't know what those reasons were. I have some suspicions. I talked with one of my aunts once about, but he was completely clear about this and to emphasize it to me growing up, he told me about the painting he had in the living room, which was of Giordano Bruno being burned at the stake. And I had to learn about who is this? What this horrible painting? He explained what this was all about.

(00:38:05):

So that saved me from an awful lot of confusion, I think about what it is that is the starting point here. Now, to jump directly into your question, since the doctrine of Christian discovery starts off as a papal decree, and it's before Spain, even it's Portugal gets one of these papal bulls and says they have a monopoly over the slave trade from Africa. I mean, it's a very nasty background to the doctrine of Christian discovery, but by the time it gets to England and the Cabot Charter, we have had a break. We see in history a break. England, the monarch of England has said, "I'm now the head of the church." We

don't want to deal with the Pope another cutoff the crown and put it on yourself. So Henry VIII says, "I am now the head of the church, the Church of England."

(00:38:59):

He didn't want to get rid of any of the doctrines of power, he would just wanted to make sure that the crown of England was the one who was actually in charge. And similar things happened when you think about the Treaty of West failure, which was an attempt to resolve those wars of religion because there were different flavors of Catholicism and different flavors of Protestantism. And there was an agreement finally that whoever is the crown, whoever wears the crown, who's going to determine what is the official religion in that domain. All right? So it was actually, even though there are all these rips and tears that you were talking about in what was called Christendom, the legal structure, and this is why lawyers, I think, see this, the legal structure was essentially created out of that Christian framework and what became called international law.

(00:39:52):

We talk about international law today, but it starts off as the law of Christian nations so that how are they to deal with each other and what are their claims against each other? And so this is where discovery, so-called grows out of is that, well, if another Christian power has already been there, then the second one coming in doesn't really have the same claim as the first one. And this played out all the way, including out in the northwest of this continent where there were disputes between Spain and France and England and even Russia, and then the United States is to who's got that, the mouth of the Columbia River and inward from there who got there first? And so it's really not a puzzle. It is a puzzle when you look at it from the point of view of how can there be something consistent through from papal decrees in the 15th century all the way through to the colonization of North America.

(00:40:53):

But in fact it is. There is a connection all the way through despite all of that turmoil. And it's a very clear connection when you piece it together at the level of what is the claim of a crown, what is the claim of sovereignty? And as I point out in the book, the notion that the US has what we haven't used that phrase today, but the US claims it has plenary power over Indigenous nations. Plenary power was precisely the power of the Pope. [foreign language 00:41:22] in Latin, full power, plenary power. So the doctrine itself is just right there, like a thread, a continuing unbroken thread despite all the chaos going all around.

Philip P. Arnold (00:41:37):

And if you could just tie this up for me anyway, I mean, I think what you're saying is that Marshall is among the kind of what? Diabolical geniuses in US history that's able to tie that thread of the doctrine of discovery to federal anti-Indian law, as you call it, right?

Peter d'Errico (00:42:02):

Yep.

Philip P. Arnold (00:42:02):

Okay.

Peter d'Errico (00:42:03):

And that's what makes it anti-Indian. And it's very clear from the original Papal decrees are very clear that the Christian sovereigns of Portugal in the beginning, Spain next had full and total power over all the peoples and all the lands that they would discover. So that piece of it is what Marshall picks up on, and he draws the picture through what we were just talking about through... Here's what England claimed. In fact, he says at one point in Marshall, in *Johnson v. M'Intosh*, Marshall says that no country claimed this doctrine more powerfully and consistently than England. And then he says, "The question is, did that doctrine get carried over to the United States?" And then he says, "Unequivocally, yes." That every power that was claimed by the British Crown as a result of its Christian ness is now devolved to the United States. So it's a very clear 1, 2, 3 step. It's just that it's buried in legalese and fine print and all the rest of it.

Philip P. Arnold (00:43:20):

So what would you like? This is a philosophical exploration of the law in many ways, and you make some recommendations to us about how we can address the doctrine of discovery today. I mean, of course there are consequences to not taking it on. So what do you think are some of the remedies that we could be looking for? I mean, this is a long legal tradition. We didn't talk about some of the intervening decisions. Maybe you could mention a few of those. You talk about ones that are previous to Marshall, Joseph story's decisions and then after *Tee-Hit-Ton* and others. But maybe you could flesh that out. But I'd like to get into what might look like a remedy or might look like an addressing of this very structural foundational issue.

Peter d'Errico (00:44:26):

Yep. Well, the question is really significant, obviously, and it's a difficult one to answer at one level because of the way law works. The clearest parallel would be the overturning of separate but equal doctrine that was Thurgood Marshall's project that was *Brown v. Board of Education*, a major change in high level doctrine. And so we need to ask, is there a model there? And the answer is in part very clearly a model. And what are the parts of the model? One is that there has to be a coherent group of people who start to do the work to come up with a coherent litigation strategy and not just run, hit or miss. And it's been pointed out by a number of people that there isn't anything like that happening in challenging federal anti-Indian law. You might think, well, why isn't NARF doing this? Is NARF doing? No. For the most part, and this is the second thing that makes it hard, is that law practice starts off as enforcing what has gone before.

(00:45:41):

Unless you work for a very powerful corporation that says, "We're footing the bill, you find a way to fix this." Then most of the time litigation is how do you just fit your client within the existing rules? You don't rock the boat. And so just the nature of legal practice means it's difficult to do what Thurgood Marshall did. In fact, there were a lot of lawyers around at the time, Black lawyers, NAACP people who were very nervous about what Thurgood Marshall was doing, because they said, "You're rocking the boat and things could be worse. Massett could get mad, so don't mess with it." And there are a lot of people who say the same thing about the situation today with Indigenous people. It is like the US could get worse, could treat us worse, so don't mess with it. So you have a multiple factors that are in the way, but the path forward is still ready to be built, I guess you might say.

(00:46:39):

And there are various, you mentioned the *Tee-Hit-Ton*, that's one case 1955, just a year after *Brown v. Board of Education* got rid of separate but equal. The Supreme Court reinforced the notion that native

peoples don't own their land. *Johnson v. M'Intosh*, it affirmed the basic *Johnson v. M'Intosh* principle and a little statistical analysis that I include at some point in the book shows that when the court did that in 1955, the Johnson precedent became even more actively cited by courts at all levels than it was before. So Tee-Hit-Ton reinvigorated that. Now it reinvigorated in the face of a direct challenge by the Tee-Hit-Ton who said, "US came, took lumber from our land. We want money for the lumber. The bottom line was it's not your lumber, it's not your land. You only exist there at the will or the grace," as he put it, the grace of the sovereign.

(00:47:40):

And interestingly in that case, one of the things I uncovered in the research I did is memos among the judges and they were arguing with each other about whether they should put the word Christian in the case because the Stanley Reed, who was writing the majority opinion, said that after the coming, the Christian White men, the natives only occupied land at the grace of the sovereign. And on the last day as the opinion with final opinion was going to be issued, he got rid of the word Christian. And so you say, "Oh, they were really arguing and we're really nervous about this." So there's clear nervousness. Gorsuch is nervous. We'll talk about that later when we talk about McGirt. But to get back to the strategy, the way forward, first of all, it seems to me recognizing the difficulties when you say what's the next step?

(00:48:31):

I would say the first thing is what not to do. The thing to when you say, "What's the best thing to do?" Well, the first thing to do is to quit hitting yourself in the head with a hammer. Okay, it'll feel better. Now you're not sure what you're going to do next, but don't keep doing the thing that's bad and that's hurting. And what is that? That's the reaffirmation again and again. And believe it or not, it happens in NARF cases, it happens in cases with native lawyers is the very first starting point is... The brief comes in, well, we recognize that Congress has plenary power over Native nations, but now we're going to try to find a little footnote and a tweak somewhere that we can make to say, well, in this case we still get to do what we want to do.

(00:49:14):

What I learned, I learned this stuff in by being thrown in the water. When I was at Yale Law School, there was no native, there was no federal Indian law course. In fact, at that time I think there were probably two or three in the whole country. So I had the benefit of not having this prepackaged view pushed at me. But that's what we have to deal with now is the prepackaged view is the conventional view that I said, lawyers like to start off with a conventional view and don't rock the boat. The conventional view, stop doing that. If you want to refer to it, open your brief by saying... So this would be step one, open your brief by saying, "The controlling doctrine is that Congress has plenary power, but we are challenging that." And that has also been done. The Yakama Nation did it in 2019 in the case of Washington state v. Cougar Den.

(00:50:07):

It was done by in the case named *Hicks v. Nevada* was a case in not too long. I can't remember the date exactly right now. But challenges directly to the notion of Christian discovery have been made. Now they have not obviously been successful at the highest level of getting that doctrine overturned, but they've been... In the Yakama case, I think they were successful in getting the court to back off of anything that would allow Washington State to interfere with the Yakama. And they just upheld the Yakama Treaty, which is what the Yakama Nation brief said has to happen. And the Yakama nation was so clear about this. Here's a fork in the road. They presented to the court, either you go with the treaty or you're going

to have to go with this horrible doctrine of Christian discovery. And the court didn't talk about Christian discovery, but they went the other way.

(00:51:01):

Nobody wanted to touch that one. So I think that it's clear that stop bowing and kowtowing, call it what it is, challenge it and be willing to be the ones that do that rocking of the boat. And there's other stuff that I deal in the book about why it feels dangerous to lawyers to do that. There are several rules that say you cannot raise a frivolous argument. You have to have good authority for your argument. Well, by now, there's plenty of good authority saying that the doctrine of Christian discovery is abhorrent. Even United Nations has said that. So yes, there the steps forward. I guess the easiest way to summarize it, there has to be strategizing and there has to be work with tactics. And those are clearly tasked yet to be done. And I separate those two. I think that they're clearly distinct strategies.

(00:51:57):

Like I say, my strategy is I want to get to the top of that mountain. That's where my goal, my strategic goal. The tactical question is, well, how do I get there? Do I just try to run straight up that cliff or do I zig and zag and how do I do that? And so if you can be in a greed strategic goal, which is what Thurgood Marshall was able to pull enough people together, then there can be the tactical questions about where to bring suit, what type of suits to look for. So it's a heavy lift, but it seems to me that it'll never happen unless there are people willing to try it.

Philip P. Arnold (00:52:34):

Interesting. That's really interesting. It sounds to me like there are these moments in US legal history where for example, one of the questions that came up was, there's not such a gulf between Marshall and Andrew Jackson's removal policy that this seems to be, they seem to be more sympathetic with the ends than has been presented in the past. At least that seems to be one of the ways of thinking about what you're saying. The other thing is that in *McGirt* jumping around here, right, *McGirt* is celebrated as a big victory for Oklahoma Native Nations in Oklahoma. And yet your reading is that it's actually in line with that trilogy of Marshall decisions.

Peter d'Errico (00:53:42):

Yeah.

Philip P. Arnold (00:53:42):

Right?

Peter d'Errico (00:53:43):

Yes. So to deal with your question about Andrew Jackson first, one of the things that I think is only obvious when you back off and puzzle about it is that Marshall doesn't even mention the Removal Act, which is a federal act. He's talking in *Worcester v Georgia* and in *Cherokee Nation v Georgia*, he's talking about the threat here is from the state of Georgia and how horrible that is, and they need this federal protection. He doesn't even refer to the fact that in 1830, which is now prior to, that's already existing. When he makes the Worcester decision, he doesn't say anything about the federal government is as much an enemy to these Cherokee people as the state of Georgia. He lets that go by completely unnoticed unmentioned. And since he only talks about the threat from the state of Georgia, it's so easy for superficial readings to say, "Oh, look at that. He was on the Cherokee side ."

(00:54:46):

And the state of Georgia followed up by Andrew Jackson, they were definitely against the Cherokee. So once you... you don't even have to dig very deep to see that. What throws you off, what takes a little bit of, when I said back off for a second, is that the fact that it's not mentioned is what attracts your attention when you read the Worcester and the Cherokee Nation cases. Why isn't Marshall talking about that? It's like the Sherlock Holmes thing, the dog that didn't bark, something's buried there. He doesn't want to touch that because that would reveal the falsity of the whole framework that the US is their guardian. Okay, so set that aside, unless you want to dig into that further in-

Philip P. Arnold (00:55:35):

Well, no, no. I think we should move on to the McGirt Nichwa-

Sandra Bigtree (00:55:37):

Well, one thing I want to interject, around that time during Teddy Roosevelt, the self-determination era was viewed as something constructive. But in effect, it was just an extension of the termination era because it was creating these new alliances with the US government and corporations to become self-determined to sell off your land rights and resource rights. Where in this history was it ever beneficial or to native people.

Philip P. Arnold (00:56:17):

So it was an extension of the Dawes Act then in that record.

Sandra Bigtree (00:56:22):

And I know NARF really focused on self-determination cases when I was there 40 years ago, they didn't handle many religious rights cases. They were really focused on self-determination.

Peter d'Errico (00:56:38):

Well, it's been quite successful, just like the notion that, oh, we have native candidates running for office. That's the success of the boarding schools and the self determination so-called, which I call self-determination. It's been very successful. You just look anywhere you... Basically anywhere around on the internet about what's happening with tribal economies so-called, you're going to see that they're clamoring to get on the bandwagon, whether it's for fracking or for some other resource extraction. And I shouldn't say they, I'm speaking too generally now because there's resistance in every one of those locations. But the fact that it's on the agenda that you find that there are places where there is tribal council approval and getting grants and having their lawyers work. We want to cash in on this resource, boom, that kind of thing. So it's quite successful. It has integrated these Indigenous governments that have been put in place for that purpose to integrate them with the US corporate economy.

Sandra Bigtree (00:57:42):

Right, always undermining their sovereignty.

Peter d'Errico (00:57:44):

Yeah, yeah, exactly. So, you want to say something about McGirt now?

Philip P. Arnold (00:57:48):

Yeah, McGirt. Yeah. Let's move on to that. And ICWA then. Yeah.

Peter d'Errico (00:57:54):

McGirt, if you don't know about it, the people listening, it's a case that involved criminal jurisdiction over a native person that the event happened on Choctaw Land and the state of Oklahoma prosecuted this person. And then the defendant said, 'Wait a minute, the state doesn't have any jurisdiction. This was on Indian land and I'm an Indian." And the 10th Circuit agreed with him and said, "Yeah." And so the case, Oklahoma appeal went up to the Supreme Court, and the first time around it was not the McGirt case, it was the same issue, but it was another defendant raising the exact same issue. And the Supreme Court deadlocked four to four because I guess it was Scalia had died at that point and had not been replaced. And Gorsuch had participated in the case or been in the 10th circuit anyway. And so they were just the case deadlocked at the Supreme Court level.

(00:58:56):

So the next case is the McGirt case raising the same issue. This time, Gorsuch is not involved, and Gorsuch convinces a majority of the court to go along with him saying that in fact that the defendant is right, the circuit court is right, this is Indian country. And it's very clear that under the existing law that the states have no jurisdiction over crimes that were committed in Indian country by Indians. And so that was the celebrate, the huge win. But the reason, the first thing you notice is, and Gorsuch is very clear about this, is that it's not a question about whether Cherokee, Choctaw, other nations, their Indigenous nations are going to have jurisdictions. A question of whether there's going to be federal jurisdiction or state jurisdiction. That's the real technical question. And the defendants that were protesting, that's what they said. They didn't say, "I should be tried in a Choctaw court."

(00:59:58):

They said, "I should be tried in a federal court." So the real decision was just back to the foundation trilogy cases. It's a question of does the federal government or the state government that has power over Indian country? And that is missed in 99% of the commentary. Now, what's most intriguing to me in Gorsuch's opinion is that, I guess two things. One is its pretty clear that he's a close reader of treaties and that sort of thing. He's sympathetic to that viewpoint that treaties ought to mean something. And he applied that in the case. And the treaty said that this is native land here and the treaty still exists. And then he also says, "How is it that the federal government comes in?" Well, the federal government already obviously violated some aspects of the treaty, for example, imposing its jurisdiction over criminal acts, the so-called Major Crimes Act.

(01:00:58):

And the US in its brief had said, as a matter of fact, it's been violated so many times, it doesn't even exist anymore. I mean, the brief from the United States is actually a laundry list of genocidal actions. If you use the international conventional on genocide, and you match it up with what the US said that it did to the Choctaw Nation, you come up with genocide. It destroyed their government. It intentionally destroyed their way of life. It attempted to eliminate them as an independent people. But Gorsuch says, "Well, okay, yes, all of those things happen, but at no point did Congress ever specifically say, we hereby terminate their existence, therefore," Gorsuch says, "They still exist." All right? So it's a complicated way that he gets there, but in the end, what he's doing is upholding his notion that there's still something left of the treaty, despite all the things that have been broken on it.

(01:01:53):

And that the underlying structure is a federal structure, federal state structure. And this is where things get interesting because it's still... As we know now from our discussion, it's all still based on Christian

discovery. How is it that the Major Crimes Act was done? How is it that Congress exercised all these powers? And Gorsuch doesn't want to touch that, he doesn't want to say, "This is what it is." But he refers to it. First of all, he cites the Lone Wolf case, which is another one of the cases that needs to be mentioned like Tee-Hit-Ton. That was in 1903 or six or something like that. It was the first case where the Supreme Court said Congress can actually just override a treaty and violate it. It doesn't matter what the treaty says. So he cites that without quoting from it. So if you don't know what that is, you just read by it.

(01:02:44):

And if you're a journalist writing an article for the paper, you don't have time to do this. You just say, "Wow. He said it's Pro Indian." Second thing he cites is an 1886, I think it was the date Treatise on Property law by Washburn. And he doesn't quote from that either. But I got curious about that one because I hadn't read that. And *Lone Wolf* I was familiar with. So I dig up Washburn's Treatise, and sure enough, he talks about the power of the government based on Christian discovery.

(01:03:16):

So McGirt in a nutshell, *McGirt* was a decision in favor of federal power as against the power of the state of Oklahoma. And it is clear that it's basis, if you track down the citation and the reasoning, it's clear that it's based in that Christian discovery doctrine. And the follow-up by the way, is that in Castro Huerta, I think was the name of the case, just very recently, there was a uproar among certain politicians, as you can imagine, particularly in Oklahoma, saying, "Well, this is really chaos here because of that McGirt decision, we've got to change this."

(01:03:56):

And they got the Supreme Court to take another case, and the Supreme Court actually basically just turned McGirt inside out in a certain way. It said that the states do have jurisdiction in Indian country, no matter that there was an earlier understanding that they didn't. And that the one thing that still exists is that if it's an Indian defendant, a crime in Indian country, it's still federal jurisdiction. But if it's an non-Indian, then it can be state jurisdiction, no problem. So there's been nothing that has come out of that that has actually been, as it was ballyhood in the press, like what a great win for Indians here.

Philip P. Arnold (01:04:37):

Wow, that's very helpful. I mean, it's a general theme that moves through and the entirety of a US history that, you have these themes popping up over and over and again in the Supreme Court. Yeah.

Sandra Bigtree (01:04:56):

You really can't unpack any of this history without unpacking religion. That's the ultimate high hierarchy where God is on some believed elevation away from this earth, and you're connecting and putting all your faith into this kind of a afterlife or salvation for your personal self. And it's the exact opposite of an Indigenous reality of connecting to a regenerative life on this planet. And in natural world that's constantly changing and shifting and defining us as human beings. You really can't separate the two. It's going to have to come together and be a critical analysis of religion, Christianity, really, because that's what's driven all of this and allowed all of this to happen on paper.

Peter d'Errico (01:05:54):

Yeah. Well, and it's very good. What you're saying is... And I get into that in the very concluding chapter of the book. It's basically a look at the religious spiritual break that needs to be addressed.

Sandra Bigtree (01:06:08):

Mm-hmm.

Philip P. Arnold (01:06:08):

Called a consciousness, right?

Peter d'Errico (01:06:10):

Yeah, yeah. A couple of words quick about ICWA?

Philip P. Arnold (01:06:14):

Yes. No. So I wanted to introduce it a little bit because our family has really been formed by the Indian Child Welfare Act. Sandy and I adopted Native Children-

Sandra Bigtree (01:06:29):

Oneida.

Philip P. Arnold (01:06:30):

Oneida, Wisconsin children who were slated, this is 27 years ago-

Sandra Bigtree (01:06:36):

20.

Philip P. Arnold (01:06:36):

Where they were slated to go to non-native family somewhere in-

Sandra Bigtree (01:06:45):

Arizona. Mm-hmm.

Philip P. Arnold (01:06:45):

... Arizona or something. But the Oneida Nation of Wisconsin said they have to go to Haudenosaunee family. So Sandy and I were looking for children to adopt, and Sandy, through enormous efforts, was able to-

Sandra Bigtree (01:07:04):

It's through Akwesasne.

Philip P. Arnold (01:07:05):

Through Akwesasne, through her nation territory, we were able to adopt the twins, Clay and Kroy. And it was all due to the Indian Child Welfare Act. And every time we see Suzan Harjo, Sandy thanks her for her efforts in making that law possible in getting it through Congress. So when we refer to ICWA, it's the Indian Child Welfare Act, which is currently being heard. Challenges to it are being heard in Congress, or sorry, in the Supreme Court right now. And I know you've been working on this as well, Peter, and we'd like to hear your own take on how this is connected to the themes that we've been talking about.

Peter d'Errico (01:07:57):

Yeah. I think that the first and most important thing for people to understand, not to get into the doctrinal thickets here because the thicket is the same as what we've been talking about. But the challenges to the Indian Child Welfare Act have caused a lot of people rightfully to become upset, but they're being upset without any clear understanding of what their argument or why they're upset or what they're upset should be directed at. And so what I mean by that is that a tremendous amount of concern is expressed in terms of civil rights and racial theories. So that people, this is what I referred to a little while ago about this phrase, BIPOC, that there are a lot of people who lump Indigenous peoples with an S, peoples into, they don't even get that there's a difference between people and peoples. So that's their first level of confusion.

(01:09:02):

They're thinking of individuals and then they lump them together with all kinds of other so-called minorities and turn it into a minority rights issue. In other words, a civil rights issue. Indigenous rights are not civil rights. This should be clear if you back up to the beginning of the discussion, the Indigenous peoples are not part of the United States. The Constitution does not cover them. The Supreme Court itself, including Scalia by the way, acknowledge that, that Native Nations are not part of the constitutional structure. So the obvious question now to arise, then how is it that the US gets power that it claims? And the answers are what we've been talking about, that how the US answers that question. But as soon as you say, wait a minute, Indigenous peoples is who the Indian Child Welfare Act was to support their existence, their continued existence as peoples.

(01:10:01):

And so that's not a civil rights issue. That's not a question that of being equal under the Constitution, that's being separate from the Constitution. And those arguments are involved in the ICWA case, but they seem as usual, the superficial coverage of things like this that pass and the newspapers and so on for this is what the case is all about that's not seen. And I think more dangerous is the fact that there are people who think that they're being quote, pro-Indian and don't even understand what they're saying, that they're playing right into an anti-Indian view by saying that, "Oh, Indians, they have civil rights too." You're playing into Pratt's view, the boarding school view, the Civilization Act view. You're playing into all of that, which that was their agenda. Get rid of Indigenous peoples and all you have left over is Indigenous individuals.

(01:10:59):

And then everything is set, then everything is set. The skids are greased. We get rid of the Indian land base, we have the whole thing as one big ball of wax. And that's what the danger is to me, is that how the level of confusion that exists. *McGirt*, as I said, there was a lot of confusion about that. This is even more confusion, it seems to me, or at least as much confusion. And the fact that it's not seen is unfortunate. It's dangerous. And none of us should be speaking loosely about this, about, "Oh, Indians have rights. Like this Indian mother or father or child." It's the Indian nations that have rights here. And if it means anything, when Congress said past this, it says that it's to strengthen the nations. Now we can be skeptical and say Congress really doesn't care about strengthening the nations. It just wants to maintain federal control. But nevertheless, these are examples of fractures in the law that need to be used in legal maneuvering, and it's a major fracture to say the difference between people and peoples.

Philip P. Arnold (01:12:11):

Right. That's very clear. That's very helpful, actually.

Peter d'Errico (01:12:15):

If I can say one more thing just to help people if you want to get into a little bit of the thicket, is that the question, that technical question that divided the Fifth Circuit so badly, 325, this is unheard of, 325 pages of judicial writing conflicting and overlapping with each other. They could not figure out their way out of this thicket. But the question behind it all technically is can Congress... It has the so-called plenary power over the Indian nations, but does that extend that Congress can tell the states what to do about Indian nation? Can it tell a state court? Because that's what has now been written in the statute, that the federal claim of its plenary power has been used to say, "Now we're going to tell the states how they should run their adoption systems." And that's where the technical battle is being waged.

Philip P. Arnold (01:13:15):

Mm-hmm. Again, back to plenary power. Yeah,

Peter d'Errico (01:13:19):

Yeah, exactly.

Philip P. Arnold (01:13:20):

Right.

Peter d'Errico (01:13:21):

Where it's the same. It's like playing chess. Once you know what the moves are, I mean the pieces, and you see the moves, you can begin to take it all apart. You say, "Oh, I see what that move was." They just moved the queen over there. Well, the queen happens to be Christian discovery.

Philip P. Arnold (01:13:36):

Yeah. So maybe we could conclude this conversation. This is very wide-ranging rich conversation with your final windup of the book. And I encourage everyone to go get this book. It's just a tremendous book. You wrap up in almost a kind of what? I hesitate to use the word spiritual, but embracing Indigenous values, we'll say. In the end, talking about really a call to consciousness because it resonates with a book that actually doesn't have an author called *Basic Call to Consciousness* written in 1977, which is about the trip, the delegation of Indigenous peoples that went to Geneva that year. But it was really written by a friend and gone too early John Mohawk. And you're concluding chapter is called A Consciousness, which is really what we're trying to achieve here in the podcast. And maybe you could just say a few things. We talked a little bit about remedies and specific things like that, but maybe you could talk a few things about the need and urgent need to embrace Indigenous values in the end.

Peter d'Errico (01:15:11):

And I think that you've characterized it fairly. It delves into what I think is fairly called a spiritual realm. And again, to quote Philip Dear again, he was talking about when he and others would go to negotiate because Philip was part of that delegation.

Philip P. Arnold (01:15:26):

He was part of that. Yes, yes.

Peter d'Errico (01:15:28):

He said, when you negotiate with the United States or with those kinds of governments, and you approach them as an Indigenous person standing on your spiritual foundation, that they don't know how to respond to you because they're not used to that, that you're going that deep, that you're talking about what is the meaning of life, what is and what isn't and so on. So that's what animates that last chapter is that... That's the level of thinking that I'm asking us to engage in. And I call it an Indigenous nomos of the earth. And I borrow that because the notion of a Christian nomos of the earth, the Christian European nomos of the Earth, that's been the structure since those papal bulls, and it's collapsing basically around us. So not only do I want to bring it to the attention that there's another. Nomos means how is the earth divided up, so to speak? And rather than being divided up by according to the Christian Powers now, it's divided up in who knows how many different ways, geo-strategic ways.

(01:16:40):

All of them still based on forms of domination, states, nation states claiming domination, powers. And so an Indigenous nomos, it seems to me, starts from a very different view of what human society's all about in which there is... The premise is not a form of domination called sovereignty. The premise is the spiritual relationship among all our relations, meaning not just human relationships, but all of reality, including the stones which are being torn up so that you can get to the lithium beneath them, for example. And until we understand that, I don't think we really have the light shining that says, "Okay, where here's what we're dealing with and here's why things are falling apart as they are." I take it, my view, the industrial civilization that is now dominant in the world is imploding and exploding in so many different ways that we can hardly keep track of it. And so what has come out of that wreckage? And of course there's been for number of years, people who say, we need one world government, everything together under one world government.

(01:17:52):

Well, that is more of the same on steroids to have a global police force and the rest of it. We saw that a little bit with the attempt to close down the world two years ago, and I think that that's not the way forward. And Carl Schmidt, who was the figure I'm referring to who wrote the book about the European public nomos of the Earth based on the Christian Powers, he rejected that notion that they're one moral government. He said, that's just such an easy thought. That's the next step. He said, it's actually quite the opposite. There needs to be a dispersal. So that's where the end of the book comes, is about the dispersal of powers and power and the diversity of different views of power. José Barreiro said once, he said, Indigenous is synonymous with diversity. So diversity doesn't mean including everybody under one umbrella.

(01:18:56):

Diversity means there's lots of umbrellas. In fact, there's some people who don't want to have an umbrella. They like to get rained on. That's part of the diversity. It's like reconciliation is talked about superficially or we going to can have reconciliation. Well, what does that mean when you have a reconciliation between two people? Something new is formed out of the reconciliation. It's not like the Canadian states is, "Oh, you get recognized... You get reconciled within the Canadian system." That's not reconciliation. So phrases that are used that are really important, reconciliation and diversity are being misused and misunderstood. That's the last chapter is calling for us to try to understand something about those kinds of concerns beyond the technical legalities.

Philip P. Arnold (01:19:41):

Tremendous. Thank you. That's really great.

Peter d'Errico (01:19:44):

By the way, Phil, if I can just mention the Praegr is the publisher, P-R-A-E-G-R, and that's the easiest way that I know to get hold of it just directly.

Philip P. Arnold (01:19:55):

Right. Again, the book is titled Federal Anti-Indian Law, the Legal Entrapment of Indigenous Peoples by Peter P d'Errico. And we'll put the link to the book on our website when this emerges. But I want to just thank you. We both want to thank you, Peter-

Sandra Bigtree (01:20:16):

Yes.

Philip P. Arnold (01:20:17):

... for being with us today, but mostly for all your continued work over the last 50 plus years on these topics. And the importance of this book is, in our view, monumental.

Sandra Bigtree (01:20:32):

Mm-hmm.

Philip P. Arnold (01:20:33):

So thanks again and wish you all the best.

Peter d'Errico (01:20:37):

Well, it's mutual. I so appreciate the work that you're both doing and all of you in that institute are doing. It's one of the things that inspires me. And so I say thank you and thank you for having this conversation. Appreciate it.

Sandra Bigtree (01:20:54):

Thank you, Peter.

Jordan Brady Loewen-Colón (01:20:58):

The producers of this podcast were Adam DJ Brett and Jordan Brady Loewen. Our intro and outro is Social Dancing music by Orris Edwards and Regis Cooks. This podcast has produced in collaboration with the Henry Foundation, Syracuse University, department of Religion, and the Indigenous Values Initiative.